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No. 84-1731

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

L. A. WILLIAMS, *Petitioner*

vs.

GENERAL MOTORS CORPORATION, *Respondent*

On Petition for Writ of Certiorari of the
United States Court of Appeals for the Fifth Circuit

Respondent's Brief in Opposition

J. R. WHEATLEY
General Motors Building
3044 West Grand Boulevard
Detroit, Michigan 48202

G. DENNIS SHEEHAN
H. CARTER BURDETTE
RALPH H. DUGGINS III
IRA BUTLER
CANTEY, HANGER, GOOCH,
MUNN & COLLINS
2100 InterFirst Tower
Fort Worth, Texas 76102
817-877-2825

Attorneys for Respondent,
General Motors Corporation

March 26, 1985

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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Petitioner, L. A. Williams, ("Williams") does not present any special or important reasons for granting a Writ of Certiorari within the scope of Rule 17 of the Rules of this Court. Williams cites no case or other authority, bringing his Petition within that Rule. Williams' effort to secure further review by this Court is bottomed solely upon hearsay statements set forth by Williams in his Application. Williams merely reasserts the same factual issues raised in his Petition for Rehearing.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit was not published pursuant to its local Rule 47.5.

JURISDICTION

The jurisdictional requisites for filing the Petition for Certiorari are inadequately set forth in the Petition. Respondent denies that the Petition presents any of the grounds required by Rule 17 of this Court for granting of a Writ of Certiorari.

QUESTIONS PRESENTED

Williams' seven enumerated "questions" as presented are not, in fact, proper questions because they are based upon false assumptions and are directly contradicted by the record in this case. Williams' statement of questions for review are, in effect, no more than a summation of the grounds he urged in his Petition for Rehearing in the Court of Appeals. After due consideration, the Petition for Rehearing was denied by the Fifth Circuit Court. Williams has presented no proper question to this Court by the Petition for Writ of Certiorari. The only proper question is:

> Whether Certiorari should be granted when review is being sought of a lower Court decision which turns solely upon an analysis of the particular facts involved?

STATUTES (RULES) INVOLVED

The procedural rules involved herein are Rules 6, 30 and 56, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Respondent, General Motors Corporation, ("GM") respectfully suggests that the statement contained in the Opinion of the Court of Appeals for the Fifth Circuit

properly sets forth all of the relevant facts. Williams' apparent statement of the case is inaccurate, incomplete, misleading and argumentative, compelling this counter-statement to correct his inaccuracies and omissions.

Williams filed this suit pro se[1] seeking damages against GM in the amount of $400,000 for alleged discrimination and defamation of character resulting from his discharge as a supervisor at GM's Plant. Williams was employed as a salaried supervisor at the GM Plant under a written employment agreement effective March 16, 1963. (Employment Agreement attached to Charles E. Posey's Affidavit in support of Motion for Summary Judgment R.78.) This agreement provided for Williams' employment on a monthly basis and was terminable by GM at any time for cause. The history of Williams' employment and the facts relative to his discharge are shown by affidavits attached to GM's Motion for Summary Judgment.

On November 26, 1981, Williams was working at the Plant on its third shift. This shift ended about 5 a.m. Together with two other supervisors, Williams walked to the salaried parking lot where a Plant security guard (Graham) saw Williams push a motorcycle to and load it

[1]Although not an indigent person, Williams represents himself "pro se". He owns and resides on a 200 acre tract of land in Johnson County, Texas. (Dep. 305). Since December 2, 1981, he has sold three houses which he owned in the City of Arlington and his resort place on Cedar Creek Lake in Bastrop County. (Dep. 34-37). Being 55 of age and with more than 10 years credited service at the time of his discharge, Williams had a vested interest in General Motors' contribution to his retirement fund. At the time of his discharge, he had the option of receiving $505 monthly providing he left his personal contribution in the retirement fund instead of taking a Metropolitan annuity policy. Williams may still exercise such an option upon surrender of his Metropolitan annuity policy and receive $505 monthly, retroactive to January 1, 1982. If he postpones the time of such an election, his monthly payment will be proportionately increased to a total of $823 at age 65. (Posey Aff.)

in his pickup which was parked beneath a large light. This motorcycle had been left by another GM employee (Smith) on the lot.

The guard assumed that Williams had Smith's permission to take the motorcycle. (Graham Affidavit R.68) After the guard had gone off duty, the owner reported that his motorcycle had been stolen. The motorcycle was returned at some time after November 30, 1981, by an unidentified person. When Graham returned to work, he learned of the notice of the stolen motorcycle and immediately reported the facts to Lieutenant Schulze in Security. Williams was then interviewed by Lieutenant Schulze and Chief W. E. Mercer of the Security force. When Mercer urged Williams to tell the truth about his involvement in the motorcycle incident, Williams offered to do so if any charges would be dropped. When Mercer replied that he could not agree to drop the charges, Williams responded that he would stick to his story as previously told to Schulze. (Mercer Affidavit R.71) Williams was twice interviewed by Plant officials and except for a vague denial, he refused to give an explanation of his involvement in the motorcycle incident.

He was then discharged and paid through the last day he had worked. (Posey Affidavit R.74) He received and cashed his check for the time worked in December without complaint or protest. He then applied to the Texas Employment Commission for unemployment benefits. After a hearing, the Commission found that Williams had taken the motorcycle from the parking lot and denied his claim. (Dep. 207-217)

Notwithstanding his vague denial to GM management that he had taken the motorcycle, Williams later admitted in his oral deposition at page 12:

> "Q. It's your testimony here under oath today that at no time you removed that green motorcycle from the GM plant?
>
> A. Okay. I will assume full responsibility for the removal of that motorcycle from the parking lot."

There are similar admissions through his deposition. For example, on page 59:

> "I told you I would accept all the blame."

Throughout his deposition, Williams refused to give the names of witnesses of his involvement in taking the motorcycle. Because of Williams' repeated refusals to answer questions seeking details regarding his involvement in the taking and returning of the motorcycle, the trial court by its Order of February 22, 1984, directed Williams "to respond fully, truthfully and accurately to each of the questions set forth in Defendant's Memorandum of Law and any follow-up questions which may be propounded to him at the continuation of his deposition." (R.52)

In light of the trial court's Order, Williams' deposition was resumed on March 21, 1984. Again, he refused to answer non-privileged questions and failed to produce the documents twice requested. He agreed, however, to produce the documents and fill in the information on the lines left blank in his original deposition and continue his testimony on April 13, 1984.

Upon the resumption of his deposition on April 13, 1984, Williams again failed to produce the documents as he had promised. Shortly after the beginning of that deposition, Williams charged out of the room and did not return for further questioning. (Dep.447) The deposition was then closed. After Williams' testimony had been transcribed, he signed his deposition which is a part of the Record.

On May 18, 1984, GM filed its Motion for Summary Judgment attached to which were six affidavits which gave the complete history of Williams' employment, the written agreement under which he was employed as a supervisor, and the facts leading to Williams' discharge. A copy of the Motion and affidavits were sent to Williams by certified mail, return receipt requested. When GM's counsel failed to receive the return receipt, Williams was sent a letter requesting that he call for the letter and documents previously mailed him. Counsel's letter of May 18, 1984, was returned by the Postmaster with a notation that it was unclaimed even though three notices had been put in Williams' post office box. GM's counsel filed a Supplemental Certificate of Service and on the same day Williams was mailed copies of the Motion for Summary Judgment, supporting affidavits and GM's Brief by first class mail. In his Notice of Appeal and Appellate Brief, Williams admits receiving all of this material on June 12, 1984. Williams having never responded to the Motion, the court on July 18, 1984, issued a Show Cause Order directing him to appear and show cause within 10 days why GM's Motion for Summary Judgment should not be granted. On July 30, 1984, the Court, after Williams had failed to appear and show cause why such an order

should not be entered, entered its Order granting GM's Motion for Summary Judgment. On August 6, 1984, Williams filed his Reply without any controverting affidavits or properly raising specific facts showing that there was a genuine issue for trial. On August 8, 1984, the trial court filed Findings of Fact and Conclusions of Law and entered final Judgment. Williams then filed his notice of appeal on August 16, 1984.

SUMMARY OF THE ARGUMENT

As the Fifth Circuit Court noted in its decision, Williams raised mainly procedural contentions in his appeal. These contentions the appellate court found to be "without merit." It is these same procedural complaints that Williams brings before this Honorable Court, after the Fifth Circuit properly found that the trial court had complied fully with the procedural requirements necessary in granting a summary judgment.

ARGUMENT

I. Petitioner failed to properly refute respondent's Motion for Summary Judgment.

Rule 56(e), Federal Rules of Civil Procedure, is clear on this question. It provides in pertinent part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.

> If he does not so respond, summary judgment, if appropriate, shall be entered against him."

It is incumbent on the opposing party to rebut the motion for summary judgment with "significant probative" evidence. See, *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Munoz v. International Alliance*, 563 F.2d 205,214 (5th Cir. 1977); *Houston v. Grocers Supply Co., Inc.*, 625 SW2d 798 (Tex. Civ. App. — Houston [14th] 1981, no writ). This principal is now well established in other circuits. For example, in *Zoby v. American Fidelity Co.*, 242 F.2d 76,80 (4th Cir. 1957), the Fourth Circuit stated:

> "It is well settled, however, that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise; and as to the foregoing matters, the record reveals no such evidence. His bare contention that the issue is disputable will not suffice." Also, see *Schoonfield v. Mayor and City Council of Baltimore*, 399 F.Supp. 1068 (D.Md. 1975).

Though it is true that a party opposing a motion for summary judgment is entitled to all the favorable inferences to be drawn from the evidence, *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967), such inferences must be firmly based on established facts. *Schoonfield, supra.* The Courts have consistently held that a motion for summary judgment cannot be defeated by factual assertions in the reply brief of the party opposing it, inasmuch as documents of this char-

acter are self-serving and are not probative evidence of the existence or non-existence of any factual issues. *Schoonfield, supra*; *Gordon v. Lipoff*, 320 F.Supp. 905 (D.C. Mo. 1970). Williams presented no evidence to rebut that which was presented by GM.

II. Respondent's utilization of petitioner's deposition testimony.

In support of GM's Motion for Summary Judgment, GM presented to the Trial Court not only sworn affidavits of third party witnesses, but also the deposition testimony of Williams.

Williams' deposition was taken pursuant to Rule 30, Federal Rules of Civil Procedure. Williams' deposition was properly noticed for November 8, 1983. (R.36.) After Williams' refusal to respond to legitimate inquiry of GM, the Trial Court entered its order of February 22, 1984, directing Williams "to respond fully, truthfully, and accurately to each of the questions set forth in Defendant's Memorandum of Law and any followup question which may be propounded to him at the continuation of his deposition." (R.52).

In light of the Trial Court's order, Williams deposition was resumed on March 21, 1984. Notice of Continuation of Oral Deposition was properly filed with the Trial Court and forwarded to the Respondent. (R.56.). Again, he refused to answer non-privileged questions and failed to produce the documents twice requested. He agreed, however, to produce the documents and fill in the information on the lines left blank in his original deposition and continue his testimony on April 13, 1984.

At all times, Williams had properly received notice of the intent to conduct oral examination under Rule 30 of the Federal Rules of Civil Procedures, without ever raising any objection. Williams appeared for the deposition, as well as its continuations.The cases cited by Williams in his Petition are not relevant to any issue before this Court.

In *Pikle-Rite Company v. Bonduel Pickling Company*, 282 F.2d 551 (E.D. Wis. 1968), the Court was confronted with testimony that proper notice of deposition was not given to one of the parties involved and for that reason, the Trial Court felt it inappropriate to give any weight to the admissions and declarations made in such deposition testimony. At no time prior to Williams' filing with this Court his Petition had he raised any objection to the deposition testimony either being taken or considered by the Trial Court. Williams' failure to timely object to the depositions constitutes a clear waiver of any errors or irregularities which might be found in notice by him. *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir. 1944), cert. denied, 65 S.Ct. 47, 323 U.S. 718, 89 L.Ed. 577, rehearing denied, 65 S.Ct. 112, 323 U.S. 813, 89 L.Ed. 647.

III. Petitioner was permitted sufficient time to respond to respondent's Motion for Summary Judgment.

As the Fifth Circuit noted, Williams' contention that he did not receive proper notice of summary judgment is clearly refuted by the procedural facts of this case. Similarly, Williams' argument that the District Court erred by not extending the time so as to allow Petitioner time

to respond to the motion is without merit. It is a contention similarly refuted by the procedural facts, aside from the circumstance that Williams never sought an extension for this purpose prior to the date fixed by order for the submission of the Motion for Summary Judgment to the District Court for its decision, see Federal Rules of Civil Procedure, Rule 56(f). Williams seeks to rely upon the decision rendered in *Beck v. Borden, Inc.*, 724 F.2d 44 (6th Cir. 1984), wherein the Court, in reviewing the time requirements of Rule 56(c), noted that the opposing party shall be "served" at least 10 days before the time fixed for the hearing with a copy of the Motion for Summary Judgment. As the record indicates, Petitioner received such notice. The ruling in *Beck*, *supra*, does not provide that the Court's Show Cause Order grant an additional 10 days to Petitioner for filing his Response. Sufficient time was granted to Petitioner. Petitioner admits in his Notice of Appeal and Brief filed with the Court of Appeals to having received all of the Respondent's Motion for Summary Judgment on June 12, 1984. Petitioner having never responded to the motion, the Trial Court, on July 18, 1984, issued a Show Cause Order directing him to appear and show cause within 10 days why GM's Motion for Summary Judgment should not be granted. On July 30, 1984, the Trial Court entered its Order granting Respondent's Motion for Summary Judgment.

Williams seeks, in his Petition before this Court to argue that the District Court erred in granting GM's Motion for Summary Judgment without first alerting Williams to the need for counter-affidavits. To sustain this proposition, Williams relies on the case of *Madyun*

v. Thompson, 657 F.2d 868 (7th Cir. 1981) wherein that Court was faced with an appeal in forma pauperis by prison inmates of the Pontiac State Prison in Illinois. As the Seventh Circuit pointed out in its opinion, there exists a doctrine which is specifically limited to pro se prisoner litigant that prior to granting a summary judgment, it is appropriate that the pro se prisoner be given adequate knowledge of the right to file and the necessity of filing counter-affidavits to oppose summary judgments. It is clear that this doctrine is not applicable to the case at hand in that: (1) Williams is not the indigent litigant found in the pro se prisoner cases, and (2) Williams clearly does not fall within the pro se inmate category.

On August 6, 1984, Williams filed a "Plaintiff's Reply to Summary Judgment" (R.122.). Insofar as this "Reply" attempts to controvert the undisputed facts relied upon by GM, the Fifth Circuit Court of Appeals closely reviewed same, and stated that:

A. Some of the denials are irrelevant;

B. Some of the denials related to time-barred defamation action; and

C. Some of the denials related to Williams contention that his discharge was wrongful because of discrimination, yet his claim for wrongful discharge is brought solely upon state law and upon his contract of employment. The uncontroverted showing is that under the contract of employment, as supervisor, GM had the right to discharge him for cause at any time.

CONCLUSION

Petitioner has failed to demonstrate that there are any grounds for the exercise of this Court's discretionary certiorari jurisdiction. The holdings in the Fifth Circuit conflict with no decision of another Court of Appeals nor of this Court. The Court of Appeals has not erroneously decided an important question of federal law nor is any important question of federal law presented by the Petition.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. R. WHEATLEY
3044 West Grand Boulevard
Detroit, Michigan 48202

G. DENNIS SHEEHAN
H. CARTER BURDETTE
RALPH H. DUGGINS III
IRA BUTLER
CANTEY, HANGER, GOOCH,
MUNN & COLLINS
2100 InterFirst Tower
Fort Worth, Texas 76102

By: _____
IRA BUTLER
2100 InterFirst Tower
Fort Worth, Texas 76102

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondent, General Motors Corporation, was served on the Petitioner by placing such copies in a properly stamped envelope, sent certified mail, return receipt requested, addressed to Mr. L. A. Williams, P.O. Box 374, Rio Vista, Texas 76093, on this the 26th day of March, 1985.

One of the Attorneys for
Respondent, General Motors
Corporation